BEFORE THE FULL BENCH: ODISHA SALES TAX TRIBUNAL, CUTTACK.

S.A. No. 57 of 2012-13

(From the order of the ld.DCST, Angul Range, Angul,
in First Appeal Case No. AA/54/AL/2008-09/2008-2009, dtd.17.08.2012,
modifying the assessment order
of the Assessing Officer)

Present: Smt. Suchismita Misra, Chairman,
Sri Subrata Mohanty, 2nd Judicial Member
&
Sri P.C. Pathy, Accounts Member-I

State of Odisha represented by the
Commissioner of Sales Tax,
Orissa, Cuttack. .... Appellant

-Versus-

M/s. Nanda Construction,
South Balanda, Talcher,
Angul. ... Respondent

For the Appellant : Mr. S.K. Pradhan, A.S.C. (C.T.)
For the Respondent : Mr. S.K. Biswal, Advocate

Date of hearing: 02.01.2019 **** Date of order: 02.01.2019

O R D E R

Revenue being aggrieved with the order of the learned First Appellate Authority/Asst. Commissioner of Sales Tax (Appeal), Angul Range, Angul (in short, FAA/ACST) whereby the deduction towards labour and service charges allowed by the Sales Tax Officer/Assessing Authority, Angul Circle, Angul (in short, STO/AA) became enhanced, this second appeal is preferred challenging the sustainability of the impugned order and with a prayer for application of Rule 4-B of the OST amendment Rule, 2010 in the case in hand for determination of labour and service charges.

2. The instant assessee dealer is a works contractor who had undertaken works under six number of Government organizations and has receipt a total of Rs.3,80,49,404.99 as against the works contracts during the tax period 2004-05. In a proceeding under Section 12(4) of the OST Act, the assessing authority determined the deduction towards labour and

service charges applying best judgment principle as he rejected the account shown by the dealer. As per order of AA, the deduction was allowed at 52% on the gross value of Rs.3,80,49,404.99. Accordingly, the total deduction towards labour and service charges was determined at Rs.1,98,74,012.84.

3. Being dis-satisfied with the percentage of deduction the dealer had preferred First Appeal Case No. AA/54/AL/2008-09 /2008-2009. Learned DCST, Angul Range, Angul as the First Appellate Authority has applied the same best judgment principle to determine the labour and service charges independent of the percentage determined by the assessing authority and thereupon vide impugned order, he has allowed labour and service charges at 55% on the gross value calculated to Rs.2,09,27,172.75.

4. Being aggrieved and dis-satisfied with such enhancement in percentage of labour and service charges, State has preferred this appeal on the ground stated above.

The appeal is heard without Cross objection from the side of the dealer.

5. The substantial questions framed for decision are,

(i) whether the application of best judgment principle to determine labour and service charges was appropriate in the case in hand, (ii) whether the standard deduction by the first appellate authority in replacing the percentage of deduction by the assessing authority is erroneous and if so, (iii) whether the deduction given by the assessing authority should be restored or a fresh judgment assessment is to be made or (iv) if the provision under Rule-4-B should be applied to the case in hand ?

Findings :

6. In the case in hand, when the question of just and reasonable percentage of deduction towards labour and service charges is considered it can safely be said that, law is no more *res-integra* in view of the authority in **M/s.Gannon and Dunkely and Co. Vrs. State of Rajasthan and Others (1993) 88 STC page 204 (SC)** wherein the Hon'ble Apex Court held as follows:

> "47. Normally, the contractor will be in a position to furnish the necessary material to establish the expenses that were incurred under the aforesaid heads of deduction for labour and services. But there may be cases where

> the contractor has not maintained proper accounts or the accounts maintained by him are not found to be worthy of credence by the assessing authority. In that event, a question would arise as to how the deduction towards the aforesaid heads may be made. On behalf of the States, it has been urged that it would be permissible for the State to prescribe a formula on the basis of a fixed percentage of the value of the contract as expenses towards labour and services and the same may be deducted from the value of the works contract and that the said formula need not be uniform for all works contracts and may depend on the nature of the works contract. We find merit in this submission. In cases where the contractor does not maintain proper accounts or the accounts maintained by him arc not found worthy of credence it would, in our view, be permissible for the State legislation to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the workscontract. It must, however, be ensured that the amount deductible under. The formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying, scales for deduction on account of cost of labour and services for various types of works contracts."

7. In the case in hand, the dealer is not satisfied with the application of principle of best judgment assessment as applied by the AA. Similarly State is not satisfied with best judgment assessment of FAA. It is not out of place to mention that, by the time the assessment was made i.e. on 31.03.2008. Rule 4-B of the OST Rules had not come into the book. So application of best judgment principle by the assessing authority at that point of time was not wrong. The assessing authority on due verification of the nature of work undertaken by the dealer had decided the percentage of deduction towards labour and service charges. In that case, it can safely be said that, if the assessment as per the best of the judgment of the assessing authority is not found to be absurd, unreasonable or without application of mind but simply a guess work having no reasonable nexus to the nature of work and when it is believed that the assessing authority was vindictive in that case the first appellate authority can exercise the jurisdiction to

interfere with the order of AA and then he can independently apply his mind to ascertain the percentage of deduction on the best judgment of his own.

8. It is pertinent to mention here that Rule 4-B of OST Rules is notified on 7th November, 2009 and as per the notification the provision shall be deemed to have come into force on 13th July, 1999. While making the provision to have its retrospective effect from 30th July,1999 it has notified the percentage of labour, service and like charges in case of works contract and the mandate of provision is not obligatory but compulsory in nature. No doubt, by the time the assessing authority had done the assessment the rule had not come into force and in that case it never can be said that the authority was wrong in application of the best judgment principle but when the provision has come into force and it has got retrospective effect that too when the nature of work is specified under the Rule then, Rule 4-B can safely be applied to the case in hand as appeal is continuation of the proceeding. When an amendment to the provision has got retrospective effect and it's application is not specifically denied to the pending cases in expressed terms then it has got application to the pending cases i.e. before the lower forum or before the higher appellate forum.

9. Adverting to the case in hand, keeping in view the ratio laid down by the authority in the case of M/s.Gannon Dunkerely (supra) that, once the works contract is not explicit about the amount spent towards labour and service charges, and once the books of account is not produced then expenses towards labour and service charges are not ascertainable. Then the expenses on account of labour and service charges shall be determined as per the table envisaged under the Rule 4-B and it must be applied scrupulously as it is reasonable and just as per legislation.

In the case in hand, it is found that, AA had allowed 52% deduction against all kinds of work on an average basis. On the other hand, Ld. FAA has allowed deduction @55/%. The nature of works undertaken by the dealer –contractor are roads work and boring of tube well, construction of retaining wall and catch water drain work, new construction, repairing and renovation of SDHCB &extension of wharf wall loading plat form at

Lingaraj OCP.:- As per Rule 4-B deduction FOR road work is 45% and for earthwork and canal work is 65%. All category of works undertaken by the dealer do not squarely fall within the ambit of Rule 4-B. In that event it is believed that, the authority should apply the provision of Rule 4-B in appropriate case where the work squarely falls within the category of work mentioned in the rule and in other case the authority is under obligation to apply the principle of best judgment assessment to assess the labour and service charges but before hand the AA is bound under law to make all endeavor to verify the contract and connected documents if produce to determine the labour and service charges first and only on failure or when the documents produced are not sufficient then he should apply rule 4-B or best judgment principle in the appropriate case. .

Resultantly, it is held that, this is a fit case where the matter should be remitted back to the Assessing Authority to make assessment afresh. Hence, it is hereby ordered.

The appeal is allowed. The impugned order of the First Appellate Authority is hereby set-aside. The matter is remanded back to the Assessing Authority for assessment afresh as per the observation above. The whole exercise should be completed within a period of three months from the date of receipt of this order.

Dictated & corrected by me,

Sd/-
(Subrata Mohanty)
2nd Judicial Member

Sd/-
(Subrata Mohanty)
2nd Judicial Member

I agree,

Sd/-
(Suchismita Misra)
Chairman

I agree,

Sd/-
(P.C. Pathy)
Accounts Member-I